

TERRINA J. GILBERTS)
)
 Plaintiff,) No. CV-10-0205-CI
)
 v.) ORDER DENYING PLAINTIFF'S
) MOTION FOR SUMMARY JUDGMENT
) AND GRANTING DEFENDANT'S
 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
 of Social Security,)
)
 Defendant.)
)

BEFORE THE COURT are cross-Motions for Summary Judgment (ECF No. 12, 14.) Attorney Lora Lee Stover represents Terrina Gilberts (Plaintiff); Special Assistant United States Attorney Kathryn A. Miller represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (ECF No. 6.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

Plaintiff protectively filed for disability insurance benefits (DIB) and Supplemental Security Income (SSI) on January 10, 2006. (Tr. 137.) She alleged disability due to heart disease, chronic depression, and dizzy spells, with an onset date of July 15, 2004. (Tr. 129.) Her claim was denied initially and on reconsideration. Plaintiff requested a hearing before an administrative law judge (ALJ), which was held on March 18, 2008, before ALJ Hayward Reed.

1 (Tr. 20.) Plaintiff, who appeared with counsel, medical expert
2 Robert Klein, Ph.D., and vocational expert Karen Black testified.
3 (Tr. 20-79.) On May 16, 2008, the ALJ denied benefits; the Appeals
4 Council denied review. (Tr. 7-19, 1-4.) The instant matter is
5 before this court pursuant to 42 U.S.C. § 405(g).

6 **STATEMENT OF THE CASE**

7 The facts of the case are set forth in detail in the transcript
8 of proceedings and are briefly summarized here. At the time of the
9 hearing, Plaintiff was 36 years old, unmarried, and living with her
10 two sons, ages 13 and 15. (Tr. 40-41.) She reported she was able
11 to do daily household chores, shopped daily, and prepared meals for
12 her children. (Tr. 142-43.) She reported she had a high school
13 education with special education classes and past relevant work as
14 a bartender, cocktail waitress, prep and short order cook, clerk,
15 warehouse worker and security guard. (Tr. 47, 130.) The VE
16 testified that with the exception of prep cook and warehouse worker,
17 Plaintiff's past work is classified as light work. (Tr. 67, 169.)
18 Plaintiff stated she could no longer work because of passing out and
19 dizzy spells. She also indicated she was nervous around people,
20 suffered migraine headaches, used a nebulizer daily for asthma
21 symptoms, and started having gastrointestinal problems two months
22 before the ALJ hearing. (Tr. 42, 46, 53, 54-56.) She testified she
23 was a binge drinker and would drink a couple times a month until she
24 passed out, but she had quit drinking alcohol about one and half to
25 two years ago. (Tr. 45-46.)

26 **ADMINISTRATIVE DECISION**

27 ALJ Reed found Plaintiff met the insured status requirements
28

1 for DIB through March 31, 2008. (Tr. 12.) At step one, he found
2 Plaintiff had not engaged in substantial gainful activity since the
3 alleged onset date. (Tr. 13.) At step two, noting Plaintiff's
4 testimony that she was a binge drinker and would drink to the point
5 of passing out, he found Plaintiff had the severe impairments of
6 "adjustment disorder, panic disorder and substance addiction
7 disorder." (Tr. 13-14.) At step two, the ALJ also noted medical
8 evidence of mild tachycardia and syncope episodes stabilized with
9 medication, as well as medical evaluations for heart disease,
10 hypertension, elevated cholesterol, thyroid disease, and diabetes
11 that revealed no significant abnormalities. He found Plaintiff's
12 reported blackouts non-severe. (Tr. 13.) At step three, he found
13 Plaintiff's impairments, including the substance use disorder, met
14 the requirements of listed impairments in 20 C.F.R., Part 404,
15 Subpart P, Appendix 1 (Listings), Sections 12.04 and 12.06. (*Id.*)

16 Having found Plaintiff disabled with the effects of substance
17 use, the ALJ proceeded to evaluate her impairments without the
18 effects of alcohol use. At steps two and three, he found without
19 the effects of substance use, she would continue to have severe
20 mental impairments of depression and anxiety, but these impairments,
21 alone or in combination, would not meet or medically equal a
22 Listing. (Tr. 14-15.) At step four, the ALJ determined Plaintiff
23 would have the residual functional capacity (RFC) to perform a full
24 range of work at all exertional levels if she stopped the substance
25 use. (Tr. 15.) He found if she stopped the alcohol use, non-
26 exertional limitations caused by her impairments would limit her
27 ability to work as follows:

1 [She can] frequently climb, balance, stoop, kneel, crouch,
2 and crawl, but she should avoid hazardous machinery or
3 heights, and climbing ropes, ladders, and scaffolds. She
4 is also moderately limited in her ability to maintain
5 attention and concentration for extended periods, perform
6 activities within a schedule, maintain regular attendance
7 and be punctual within customary tolerances, and accept
8 instructions and respond appropriately to criticism from
9 supervisors.

10 (Tr. 15.)

11 After discussing Plaintiff's testimony and symptom allegations,
12 the ALJ determined Plaintiff was not credible to the extent her
13 statements are inconsistent with the final RFC without substance
14 addiction. (Tr. 16.) Considering Plaintiff's RFC and VE testimony,
15 the ALJ found if Plaintiff stopped using alcohol, she could perform
16 her past work as a cook, retail clerk, warehouse worker, and
17 security guard. (Tr. 18.) He concluded Plaintiff's substance use
18 is a "contributing factor material to disability"; therefore,
19 Plaintiff has not been found "disabled" as defined by the Social
20 Security Act through the date of the decision. (*Id.*)

21 STANDARD OF REVIEW

22 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
23 court set out the standard of review:

24 A district court's order upholding the Commissioner's
25 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
26 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
27 Commissioner may be reversed only if it is not supported
28 by substantial evidence or if it is based on legal error.
Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999).
Substantial evidence is defined as being more than a mere
scintilla, but less than a preponderance. *Id.* at 1098.
Put another way, substantial evidence is such relevant
evidence as a reasonable mind might accept as adequate to
support a conclusion. *Richardson v. Perales*, 402 U.S.
389, 401 (1971). If the evidence is susceptible to more
than one rational interpretation, the court may not
substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of*
Social Sec. Admin., 169 F.3d 595, 599 (9th Cir. 1999).

1 The ALJ is responsible for determining credibility,
2 resolving conflicts in medical testimony, and resolving
3 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
4 Cir. 1995). The ALJ's determinations of law are reviewed
5 *de novo*, although deference is owed to a reasonable
6 construction of the applicable statutes. *McNatt v. Apfel*,
7 201 F.3d 1084, 1087 (9th Cir. 2000).

8 It is the role of the trier of fact, not this court, to resolve
9 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence
10 supports more than one rational interpretation, the court may not
11 substitute its judgment for that of the Commissioner. *Tackett*, 180
12 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984).
13 Nevertheless, a decision supported by substantial evidence will
14 still be set aside if the proper legal standards were not applied in
15 weighing the evidence and making the decision. *Browner v. Secretary*
16 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
17 there is substantial evidence to support the administrative
18 findings, or if there is conflicting evidence that will support a
19 finding of either disability or non-disability, the finding of the
20 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
21 1230 (9th Cir. 1987).

22 **SEQUENTIAL EVALUATION PROCESS**

23 The Commissioner has established a five-step sequential
24 evaluation process for determining whether a person is disabled. 20
25 C.F.R. §§ 404.1520(a), 416.920(a); see *Bowen v. Yuckert*, 482 U.S.
26 137, 140-42 (1987). In steps one through four, the burden of proof
27 rests upon the claimant to establish a prima facie case of
28 entitlement to disability benefits. *Rhinehart v. Finch*, 438 F.2d
920, 921 (9th Cir. 1971). This burden is met once a claimant
establishes that a medically determinable physical or mental
impairment prevents him from engaging in his previous occupation.

20 C.F.R. §§ 404.1520(a), 416.920(a). "This requires the presentation of 'complete and detailed objective medical reports of his condition from licensed medical professionals.'" *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999).

If a claimant cannot do his past relevant work, the ALJ proceeds to step five, and the burden shifts to the Commissioner to show that (1) the claimant can make an adjustment to other work; and (2) specific jobs exist in the national economy which claimant can perform. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v); *Kail v. Heckler*, 722 F.2d 1496, 1497-98 (9th Cir. 1984).

ISSUES

The question is whether the ALJ's decision is supported by substantial evidence and free of legal error. Plaintiff argues the ALJ erred: (1) in finding substance use was a contributing factor to disability at all times relevant to her applications for benefits; (2) at step two when he failed to identify severe physical impairments supported by medical evidence; (3) in assessing her RFC; and (4) in posing an incomplete hypothetical to the VE. (ECF No. 13 at 9.) Plaintiff also contends the ALJ's credibility findings are not based on convincing evidence. (*Id.* at 15.)

DISCUSSION

A. Sequential Evaluation in the Context of Alcohol Addiction

In 1996, the Contract with America Advancement Act (CAAA) amended the Social Security Act, providing that "an individual shall not be considered to be disabled . . . if alcoholism or drug addiction would . . . be a contributing factor material to the Commissioner's determination that the individual is disabled." 42 U.S.C. § 423(d)(2)(C). Following these amendments, the Commissioner

1 promulgated regulations governing disability claims that involve
2 substance abuse. 20 C.F.R. §§ 404.1535(a), 416.935(a). Accordingly,
3 an adjudicator in disability proceedings first must conduct the
4 five-step inquiry without attempting to determine the impact of a
5 substance abuse disorder. If the ALJ finds that the claimant is not
6 disabled under the five-step inquiry, the claimant is not entitled
7 to benefits, and there is no need to proceed with further analysis.
8 *Bustamante v. Massanari*, 262 F.3d 949, 955 (9th Cir. 2001). If the
9 ALJ finds the claimant disabled, and there is evidence of substance
10 abuse, the ALJ should proceed under the sequential evaluation and §§
11 404.1535 or 416.935 to determine if the claimant would still be
12 disabled absent the substance abuse. *Bustamante v. Massanari*, 262
13 F.3d 949, 955 (9th Cir. 2001). If found disabled with the effects of
14 substance abuse, the claimant has the burden in steps one through
15 four of the second sequential evaluation process to prove drug or
16 alcohol abuse is not a contributing factor material to his
17 disability. *Parra v. Astrue*, 481 F.3d 742, 748 (9th Cir. 2007).

18 As stated by the *Parra* court, "An alcoholic claimant who
19 presents inconclusive evidence of materiality has no incentive to
20 stop drinking, because abstinence may resolve his disabling
21 limitations and cause his claim to be rejected or his benefits
22 terminated." *Id.* at 750. Thus, through the CAAA, Congress seeks
23 "to discourage alcohol and drug abuse, or at least not to encourage
24 it with a permanent government subsidy." *Id.* at 749; *Ball v.*
25 *Massanari*, 254 F.3d at 817, 824 (9th Cir. 2001). Therefore, a
26 plaintiff must provide competent evidence of a period of abstinence
27 and medical source opinions relating to that period sufficient to
28 establish alcoholism is not a contributing factor material to

1 alleged impairments and disability. *Parra*, 481 F.3d at 748-49.

2 Plaintiff concedes she was a binge drinker and drank to the
3 point of passing out, a fact supported by the record. (Tr. 44, 46.)
4 She testified she "had stopped abusing alcohol after 2006." (ECF
5 No. 13 at 12, Tr. 45.) She appears to argue that because there is
6 no evidence of "ongoing addiction" after November 2006, the ALJ
7 erred in finding her alcohol use was material to a finding of
8 disability. The Commissioner's regulations and the legal standard
9 governing cases in which there is evidence of substance addiction
10 render this argument without merit.

11 As noted above, where there is evidence of substance addiction,
12 the ALJ is required to conduct a first sequential evaluation with
13 the effects of drug or alcohol addiction. Here, Plaintiff was found
14 disabled, and there is evidence of alcoholism; therefore, a second
15 sequential evaluation of Plaintiff's impairments without the effects
16 of alcohol must be conducted. *Bustamante*, 262 F.3d at 955.

17 Plaintiff does not disagree that she was disabled with the
18 effects of her alcohol abuse from the alleged onset date until at
19 least November 2006. (ECF No. 13 at 12; Tr. 270.) Emergency room
20 reports of acute intoxication and Plaintiff's own testimony support
21 the ALJ's first sequential evaluation and determination that with
22 the substance addiction disorder (12.09), Plaintiff met Listings
23 12.04 and 12.06. It is Plaintiff's burden to provide competent
24 evidence of a period of abstinence sufficient to establish
25 alcoholism is not a contributing factor material to alleged
26 impairments and disability. *Parra*, 481 F.3d at 748-49. Plaintiff's
27 allegation that her alcohol addiction did not continue appears to be
28 based solely on Dr. Klein's conclusory statement that "there was no

1 diagnosis under Listing 12.09 after 2006." (ECF No. 13 at 12.) A
2 lack of diagnosis under 12.09 is inadequate to establish that
3 Plaintiff was not using alcohol from November 2006, through the date
4 of the decision.¹ Even assuming she did stop using alcohol after
5 November 2006, this fact does not alter the outcome of these
6 proceedings. As required by the regulations and case law, the ALJ
7 conducted a second sequential evaluation in which he assumed
8 Plaintiff had stopped using alcohol. (Tr. 14-18.)

9 The ALJ properly made specific findings regarding Plaintiff's
10 remaining impairments and ability to perform work activities without
11 the effects of alcohol use during the period at issue, including
12 that time during which Plaintiff claims "no ongoing addiction."
13 Thus, the question before the court is whether the ALJ's findings in
14 the sequential evaluation without the effects of alcohol abuse are
15 supported by substantial evidence and free of legal error.

16 **B. Credibility**

17 Plaintiff contends that symptoms identified in her testimony
18 are caused by medically determinable impairments and, thus, support
19 a finding of disability without the effects of alcohol. She asserts
20 the ALJ did not give "convincing rational" for rejecting her
21

22 ¹ For example, it is noted on review that new evidence
23 submitted to the Appeals Council includes reports of renewed alcohol
24 use in October 2008, five months after the denial of disability
25 benefits. (Tr. 638.) This new evidence calls into question the
26 credibility of Plaintiff's statements that she had stopped using
27 alcohol after the November 2006 episode.

1 testimony that she suffered symptoms that would not allow her to
2 sustain work. (ECF No. 13 at 15.) However, an adjudicator cannot
3 be required to believe every allegation of disabling limitations,
4 "or else disability benefits would be available for the asking, a
5 result plainly contrary to 42 U.S.C. § 423 (d)(5)(A)." *Fair v.*
6 *Bowen*, 885 F.2d 597, 603 (9th Cir. 1989). Further, the fact that a
7 medically determinable condition exists does not automatically mean
8 the symptoms are "severe," or "disabling" as defined by the Social
9 Security regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair*
10 *v. Bowen*, 885 F.2d 597, 602-03 (9th Cir. 1989); *Key v. Heckler*, 754
11 F.2d 1545, 1549-50 (9th Cir. 1985).

12 Where, as here, the ALJ finds claimant's statements are not
13 credible, he must make a credibility determination with findings
14 sufficiently specific to permit the court to conclude the ALJ did
15 not arbitrarily discredit claimant's allegations. *Thomas v.*
16 *Barnhart*, 278 F.3d 947, 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*,
17 947 F.2d 341, 345-46 (9th Cir. 1991) (en banc). If there is no
18 affirmative evidence that the claimant is malingering, the ALJ must
19 provide "clear and convincing" reasons for rejecting the claimant's
20 symptom testimony. *Reddick v. Chater*, 157 F.3d 715, 722 (9th Cir.
21 1998). The ALJ engages in a two-step analysis in deciding whether
22 to admit a claimant's subjective symptom testimony. *Lingenfelter v.*
23 *Astrue*, 504 F.3d 1028, 1035-36 (9th Cir. 2007); *Smolen v. Chater*, 80
24 F.3d 1273, 1281 (9th Cir. 1996). Under the first step, the ALJ must
25 find the claimant has produced objective medical evidence of an
26 underlying "impairment," and that the impairment, or combination of
27 impairments, could reasonably be expected to cause "some degree of

1 the symptom." *Lingenfelter*, 504 F.3d at 1036. Once the first test
2 is met, the ALJ must evaluate the credibility of the claimant. As
3 explained by the Commissioner in his policy ruling, the ALJ need not
4 totally reject a claimant's statements; he may find the claimant's
5 symptom testimony to be credible to a certain degree but "find only
6 partially credible the individual's statements as to the extent of
7 the functional limitations." SSR 96-7p. If a claimant's testimony is
8 either rejected or discounted, the ALJ must give specific "clear and
9 convincing reasons" for doing so, and his reasoning must be
10 supported by the record. *Morgan v. Comm'r of Soc. Sec. Admin.*, 169
11 F.3d 595, 599 (9th Cir. 1999).

12 Here, the ALJ specifically identified Plaintiff's testimony he
13 found unreliable and explained what evidence undermines the
14 testimony. (Tr. 16-17.) *Holohan v. Massanari*, 246 F.3d 1195, 1208
15 (9th Cir. 2001). He noted inconsistencies between Plaintiff's
16 statements and medical evidence that indicates her blackouts were
17 related to alcohol use, hyperventilation or other non-neurological
18 causes. He also referenced objective medical evidence that her
19 syncope episodes had decreased significantly. (Tr. 16.)
20 Inconsistency with the medical record is a legally sufficient basis
21 for rejecting Plaintiff's subjective testimony. *Johnson v. Shalala*,
22 60 F.3d 1428, 1434 (9th Cir. 1995).

23 The record shows in February 2006, neurology specialist Alan
24 Troupin, M.D., found no abnormalities or neurological disease to
25 explain her syncope. He opined her condition was related to anxiety
26 attacks and recommended counseling. (Tr. 181.) Emergency room
27 reports documenting blackouts indicate Plaintiff was extremely
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1 intoxicated when she presented at the hospital for treatment, and
2 specifically noted she "has frequent visits for alcohol." (Tr. 44,
3 187, 199-200, 270, 434-35.) As noted by the ALJ, there are no
4 reports of treatment for black-outs in which alcohol intoxication
5 was not present. (Tr. 44.) In addition, the record includes results
6 from objective diagnostic tests (including attempted induction of
7 symptoms) and clinic notes from heart specialist Timothy Lessmeier,
8 M.D., indicating no abnormal heart condition. (Tr. 258, 274.)

9 Dr. Lessmeier reviewed diagnostic "tilt test" results and found
10 "no clear evidence of neurocardiogenic syncope." (Tr. 258, 268.)
11 In March 2005, an echocardiogram was interpreted as normal by
12 cardiologist Michael Hostetler. In his review of prior medical
13 evaluations Dr. Hostetler noted no significant findings that would
14 explain Plaintiff's symptoms. (Tr. 305-08.) Readouts from a "loop
15 recorder" implanted in March 2005 to detect syncope episodes showed
16 only non-significant readings for the time Plaintiff wore the
17 monitor, and on occasion, no evidence of self-reported episodes.
18 (Tr. 274, 276-78, 283, 300, 306-07, 403, 513.) The loop recorder
19 was ex-planted in September 2007, at Plaintiff's request, within ten
20 months of Plaintiff's self-reported abstinence from alcohol. (Tr.
21 525.) Significantly, at the time the loop recorder was removed, Dr.
22 Lessmeier concluded Plaintiff was "stable on medical therapy" and
23 "asymptomatic," and the monitor was no longer needed. (Tr. 525,
24 545.) In January 2008, Plaintiff reported to Heart Clinics Northwest
25 that she had "stable control of her symptoms for the last four
26 months." (Tr. 534.) These medical reports are inconsistent with
27 Plaintiff's testimony that she had a heart condition that prevented
28

1 her from working. The medical evidence amply supports the ALJ's
2 credibility determination. SSR 96-7p.

3 The ALJ also found Plaintiff's daily activities were not
4 consistent with her allegations of disability. (Tr. 16.) This is
5 a "clear and convincing" reason for discounting a claimant's
6 allegations of disabling symptoms. *Fair v. Bowen*, 885 F.2d 597, n.5
7 (9th Cir. 1989); *Light v. Social Sec. Admin.*, 119 F.3d 789, 792 (9th
8 Cir. 1997). The record in its entirety, as reviewed by the ALJ,
9 shows Plaintiff takes care of her two adolescent sons, performs
10 household chores, cooks, shops, and engages in home hobbies. (Tr.
11 16, 140, 142, 143.)

12 Finally, the ALJ referenced Plaintiff's testimony that she had
13 stopped drinking two years ago, although the record includes an
14 emergency room report of drinking to the point of unconsciousness in
15 November 2006. (Tr. 16.) The record also indicates during the
16 alleged period of disability, Plaintiff was inconsistent in her
17 report of alcohol use to medical providers.² (Tr. 303, 359, 475.)
18 These examples of Plaintiff's lack of candor about alcohol use
19 support an adverse credibility finding. *Verduzco v. Apfel*, 188 F.3d
20 1087, 1090 (9th Cir. 1999). The ALJ credibility determination is
21 supported by substantial evidence and free of legal error. *Burch v.*
22 *Barnhart*, 400 F.3d 676, 680-81; *Tommasetti v. Astrue*, 533 F.3d 1035,
23 1039 (9th Cir. 2008).

24
25 ² The record documents emergency room treatment for alcohol
26 related episodes on the following dates: January 14, 2006; March 4,
27 2006, March 18, 2006, April 22, 2006, and November 30, 2006. (Tr.
28 434, 199, 194, 183, 270.)

1 **C. Physical Impairments**

2 Plaintiff argues that the ALJ ignored limitations from the
3 physical impairments of chest pains, asthma, obesity, syncope,
4 tachycardia, dizziness, and migraines. (ECF No. 13 at 13.) She
5 contends his failure to give reasons for ignoring this evidence is
6 error, and his determination that she can perform work at all
7 exertional levels³ is reversible error. (*Id.* at 12-14.)

8 As discussed above, the ALJ credited evidence which includes
9 treating heart specialist Dr. Lessmeier and examining neurologist
10 Allan Troupin, M.D. As found by the ALJ, neither Dr. Troupin nor
11 Dr. Lessmeier could identify a medical reason her reported syncope
12 and dizziness other than hyperventilation or alcohol use. (Tr. 16,
13 300, 305-06.) Dr. Troupin examined Plaintiff in February 2006, when
14 Plaintiff was drinking alcohol to inebriation. (Tr. 181-82, 199,
15 433.) He reported extensive cardiac evaluations in the past
16 revealed no evidence of arrhythmia or cardiac events to explain
17 Plaintiff's episodes. Upon exam, Dr. Troupin found no medical
18 evidence of neurological disease to explain her symptoms. Based on
19 Plaintiff's self-reported symptoms, Dr. Troupin attributed her self-

20 _____
21 ³ A claimant's exertional level defines the individual's
22 capacity "to perform each of seven strength demands: sitting,
23 standing, walking, lifting, carrying, pushing, and pulling." SSR
24 96-8p. Nonexertional capacity relates to "limitations and
25 restrictions that do not depend on an individual's physical
26 strength." *Id.* Physical non-exertional limitations include
27 postural, manipulative, visual, and communicative limitations, as
28 well as environmental factors. *Id.*

1 reported "dizziness" and "blackouts" to anxiety attacks with
2 hyperventilation symptoms. (Tr. 181.)

3 During the period Dr. Lessmeier treated Plaintiff, he noted no
4 significant readings on a surgically implanted loop recorder that
5 would explain Plaintiff's self-reported syncope. (Tr. 305.) The
6 record also shows that by December 2006, Plaintiff reported no
7 syncope or palpitations. (Tr. 284.) Plaintiff's recorded
8 tachycardia symptoms were improving with prescribed medication.
9 (Tr. 283.) Dr. Lessmeier opined Plaintiff was stable and
10 asymptomatic by September 2007, when she had her loop recorder
11 removed. (Tr. 545.) In response to the ALJ's questioning,
12 Plaintiff conceded she was stable on medication at the time the loop
13 recorder was removed. (Tr. 63.) Thus, medical evidence does not
14 support a finding of heart disease or neurological disease.
15 Substantial evidence supports the ALJ's finding that without the
16 effects of alcohol, Plaintiff did not have more than minimal
17 limitations due to syncope, tachycardia, or dizziness.

18 Nonetheless, Plaintiff's self-reported dizziness was accepted
19 to some degree by the ALJ, as reflected in the final RFC
20 determination. The ALJ specifically found Plaintiff should avoid
21 hazardous machinery, heights, and climbing ropes, ladders and
22 scaffolds. (Tr. 15.) These postural limitations due to Plaintiff's
23 dizzy spells do not decrease her abilities to carry, lift, sit/stand
24 or walk with normal breaks, push and/or pull. The ALJ's finding
25 that Plaintiff could perform work at all exertional levels is
26 supported by substantial evidence.

27 Plaintiff fails to identify specific medical evidence in the
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1 record to support her assertion that obesity, asthma, migraines, and
2 chest pain were severe or caused work-related limitations. 20
3 C.F.R. §§ 404.1520(c); 416.920(c); see also *Carmickle v.*
4 *Commissioner*, 533 F.3d 1155, 1161 n.2 (9th Cir. 2008)(review court
5 declined to address issues not argued with specificity in
6 appellant's brief). The fact that a medically determinable condition
7 exists does not automatically mean the symptoms are "severe," or
8 "disabling" as defined by the Social Security regulations. See,
9 e.g., *Edlund*, 253 F.3d at 1159-60; *Fair*, 885 F.2d at 603; *Key v.*
10 *Heckler*, 754 F.2d 1545, 1549-50 (9th Cir. 1985). Medical evidence
11 must show that a diagnosed condition (1) causes functional
12 limitations that have more than a minimal effect on Plaintiff's
13 ability to do work activities, and (2) last more than 12 months. 20
14 C.F.R. §§ 404.1509, 416.909; SSR 96-3p. Here, providers make no
15 specific mention of limitations or significant problems caused by
16 excess weight, asthma, chest pain, or migraines. Plaintiff's
17 subjective complaints alone cannot be the basis for a finding of a
18 severe impairment or disability. *Key v. Heckler*, 754 F.2d 1545,
19 1549-50; SSR 96-7p. Independent review of the medical records from
20 Group Health indicate a prescribed medication regime decreased
21 Plaintiff's migraine and asthma symptoms. (Tr. 597-99.) As
22 reported by Plaintiff in October and November 2007, her medications
23 were working well, (Tr. 597), and she testified she did not
24 experience medication side effects. (Tr. 34, 56.) "Impairments
25 that can be controlled effectively with medication are not disabling
26 for the purpose of determining eligibility for SSI benefits." *Warre*
27 *v. Commissioner of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9th Cir.

28

1 2006)(citations omitted).

2 Plaintiff has not met her burden under step two or step four to
3 show that obesity, asthma, migraines, or chest pain, without the
4 effects of alcohol, caused more than minimal limitations in her
5 work-related abilities.

6 **D. Hypothetical Question and RFC Determination**

7 During the hearing, the ALJ posed five hypothetical questions
8 to the VE to determine if Plaintiff could her perform past relevant
9 work.⁴ (Tr. 68-72.) Plaintiff argues the ALJ failed to include
10 mental limitations assessed by non-examining medical expert Ronald
11 Klein, Ph.D.⁵ (ECF No. 13 at 12, 14; Tr. 616-17.) This argument is
12 without merit.

13 A review of the record shows Dr. Klein opined Plaintiff would
14 have moderate difficulties, without the effects of alcohol, in her
15 ability to maintain attention and concentration for extended periods
16 (for emotional reasons); perform activities within a schedule,
17 maintain regular attendance and be punctual; accept instructions and

18 _____
19 ⁴ Based on her review of the record and Plaintiff's testimony
20 the VE identified Plaintiff's past relevant work as: bartender
21 cocktail waitress; prep cook; short order cook; clerk-retail books;
22 clerk-inventory supervisor; warehouse worker; and security guard.
23 (Tr. 169, 64-67.)

24 ⁵ Without referencing the record, Plaintiff states Dr. Klein
25 "commented that medications could affect her cognitively." (ECF No.
26 13 at 13.) However, as mentioned above, the evidence in its
27 entirety indicates her medications were working well and she did not
28 experience side effects. (Tr. 34, 56.)

1 respond appropriately to criticism from supervisors. He also noted
2 "anxiety symptoms would distract her periodically." (Tr. 616-17.)
3 In his fourth hypothetical individual, the ALJ specifically included
4 the mental limitations identified by Dr. Klein. (Tr. 72.) The VE
5 testified this individual would be able to perform Plaintiff's past
6 relevant work, with the exception of inventory clerk with
7 supervisory duties. (*Id.*)

8 The ALJ's final RFC substantially reflects the mental
9 limitations assessed by Dr. Klein. (Tr. 15.) As stated in the
10 regulations governing these proceedings, the RFC determination
11 represents the most a claimant can still do despite her physical and
12 mental limitations. 20 C.F.R. §§ 404.1545, 416.945. The RFC
13 assessment is not a "medical issue" under the Regulations; it is
14 based on all relevant evidence in the record, not just medical
15 evidence. *Id.* Further, the Supreme Court has held explicitly that
16 the ALJ is "responsible for determining credibility, resolving
17 conflicts in medical testimony and for resolving ambiguities," in
18 these proceedings. *Richardson*, 402 U.S. at 400; *Andrews*, 53 F.3d at
19 1039; *SSR 96-8p*. The final determination regarding a claimant's
20 ability to perform basic work is the sole responsibility of the
21 Commissioner. 20 C.F.R. § 416.946; *SSR 96-5p* (RFC assessment is an
22 administrative finding of fact reserved to the Commissioner). No
23 special significance is to be given to a medical source opinion on
24 issues reserved to the Commissioner. 20 C.F.R. §§ 404.1527(e),
25 416.927(e). Where, as here, ALJ's determination is a rational
26 interpretation of the evidence, the court may not substitute its
27 judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097.

1 Because the RFC reasonably reflects all limitations supported by the
2 evidence, including Dr. Klein's testimony and Plaintiff's credible
3 testimony, the Commissioner's final RFC and step four findings that
4 Plaintiff can perform the identified past relevant work are
5 affirmed.

6 **CONCLUSION**

7 The Commissioner's denial of benefits is supported by
8 substantial evidence and without legal error. Plaintiff did not
9 meet her burden of proving that she is disabled absent the effects
10 of alcohol use. Accordingly,

11 **IT IS ORDERED:**

12 1. Plaintiff's Motion for Summary Judgment (**ECF No. 12**) is
13 **DENIED;**

14 2. Defendant's Motion for Summary Judgment (**ECF No. 14**) is
15 **GRANTED;**

16 3. Judgment shall be entered for Defendant.

17 The District Court Executive is directed to file this Order and
18 provide a copy to counsel for Plaintiff and Defendant and the file
19 shall be **CLOSED**.

20 DATED November 14, 2011.

21
22 S/ CYNTHIA IMBROGNO
23 UNITED STATES MAGISTRATE JUDGE
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